No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. § 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in the 2000 census in determining the population for the purpose of apportioning Representatives among the states.

2. Whether Article I, Section 2, Clause 3 of the Constitution prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the states.

PARTIES TO THE PROCEEDINGS

The United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census, are appellants in this case and were defendants below;

The United States House of Representatives is an appellee in this case and was the plaintiff below;

National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California; and

Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their capacities as members of the United States House of Representatives; and

Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; and

City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Long Beach, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; City of Cudahy, California; County of Santa Clara, California; County of San Bernardino, California; County Of Alameda, California; County of Riverside, California; State of New Mexico; City of Detroit, Michigan; City of Bell, California; City of Gardena, California; City of Huntington Park, California; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Guitierrez, John Conyers, Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez, Carlos Romero-Barcelo, individually and in their capacities as members of the United States House of Representatives,

are appellees in this case and were intervenor-defendants below.

RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

The Essential Failure of Traditional Enumeration Methods To Count Minorities Equally 5

The Differential Undercount Results in the Dilution of Minority Votes 9

The Differential Undercount of Minorities May Distort the Apportionment of Representatives Among the States 11

The Differential Undercount Results in Diminished Federal Funds for Minorities . . . 12

The Legal Underpinnings of the Decennial Census 13

The Census 2000 Plan 14

The Lawsuit and Proceedings Below 16

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. THE CENSUS ACT EXPRESSLY PERMITS THE USE OF STATISTICAL SAMPLING FOR PURPOSES OF APPORTIONMENT 19

A. The Text of the Statute, in Plain and Unambiguous Terms, Permits the Use of Sampling for Purposes of Apportionment 19

B. Consistent with the Text, the Legislative History of the Statute Demonstrates Congress's Intent to Permit the Use of Sampling for Congressional Apportionment 24

C. Subsequent Legislative Actions Further Confirm Congress's Intent 26

D. If the Statute is Deemed Ambiguous, Under *Chevron*, Considerable Deference Should Be Given to the Census Bureau's Current Interpretation of the Statute 29

II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING IN ENUMERATING THE POPULATION FOR PURPOSES OF APPORTIONMENT 33

A. The Language of the Census Act Does Not Prescribe a Particular Method of Determining the Total Population Figure 34

B. Evidence of the Framers' Intent Shows That a Specific Method Determining the Numbers of the Total Population Was Never Contemplated 36

C. The Fourteenth Amendment Commands That Congress Count All Persons Equally 44

D. Census Methods of the Past Do Not Constrain the Discretion of Congress 45

E. A Bar to Statistical Sampling is Inconsistent With the Goals of Equal Representation and Equal Protection 46

CONCLUSION 49

TABLE OF AUTHORITIES

CASES

Aeron Marine Shipping Co. v. *United States*,
695 F.2d 567 (CADC 1982) 22

Andrus, Secretary of the Interior v. *Shell Oil Co.*,
446 U.S. 657 (1980) 26

Avery v. *Midland County*,
390 U.S. 474 (1968) 10

Baldrige v. *Shapiro*,
455 U.S. 345 (1982) 12

Carey v. *Klutznick*,
508 F. Supp. 404 (S.D.N.Y. 1980) 25

Chevron U.S.A. Inc. v. *Natural Resource Defense Council, Inc.*,
467 U.S. 837 (1984) 29, 30, 31, 33

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34 F.3d 1114 (CA2 1994), *rev'd on other grounds sub nom. Wisconsin* v. *City of New York*,
517 U.S. 1 (1996) 25

City of Philadelphia v. *Klutznick*,
503 F. Supp. 663 (E.D. Pa. 1980) 25

Clark v. *Uebersee Finanz-Korporation, A.G.*,
332 U.S. 480 (1947) 22

Cuomo v. *Baldrige*,
674 F. Supp. 1089 (S.D.N.Y. 1987) 7, 10

Elk v. *Wilkins*,
112 U.S. 94 (1884) 44

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 46

Freytag v. *Commissioner of Internal Revenue*,
501 U.S. 868 (1991) 23

Karcher v. *Daggett*,
462 U.S. 725 (1983) 5, 6, 8, 10, 48

Kirkpatrick v. *Preisler*,
394 U.S. 526 (1968) 10

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*,
__ U.S. __, 118 S. Ct. 956,
140 L. Ed. 2d 62 (1998) 22

M'Culloch v. *Maryland*,
17 U.S. 316 (1819) 45

National Mut. Ins. Co. of District of Columbia v. *Tidewater Tranfser Co., Inc*,
337 U.S. 582 (1949) 45

Red Lion Broadcasting Co., Inc. v. *FCC*,
395 U.S. 367 (1969) 26, 29

Regions Hospital v. *Shalala, Secretary of Health and Human Services*,
__ U.S. __, 118 S. Ct. 909,
139 L. Ed. 2d 895 (1998) 26

Reynolds v. *Sims*,
377 U.S. 533 (1964) 9, 10, 11, 47

Russello v. *United States*,
464 U.S. 16 (1983) 19

Rust v. *Sullivan*,
500 U.S. 173 (1991) 31

Smiley v. *Citibank, N.A.*,
517 U.S. 735 (1996) 31

State v. *Mosbacher*,
783 F. Supp. 308 (S.D. Tex. 1992) 12

Ullmann v. *United States*,
350 U.S. 422 (1956) 46

United States v. *Fisher*,
2 Cranch 358 (1805) 26

Wesberry v. *Sanders*,
376 U.S. 1 (1964) 10, 47

Wisconsin v. *City of New York*,
517 U.S. 1 (1996) . . . . . *passim*

Yick Wo v. *Hopkins*,
118 U.S. 356 (1886) 9

Young v. *Klutznick*,
497 F. Supp. 1318 (E.D. Mich 1980)
rev'd on jurisdictional grounds, 652 F.2d 617 (CA6 1981), *cert. denied sub nom. Young* v. *Baldrige*, 455 U.S. 939 (1982) 10, 25

Young v. *Klutznick*,
652 F.2d 617 (CA6 1981),
cert denied sub nom. Young v. *Baldrige*, 455 U.S. 939 (1982) 10

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 44

CONSTITUTION

U.S. CONST.:

art. I . . . . . *passim*

art. I, § 2 48

art. I, § 2, cl. 1 47

art. I, § 2, cl. 3 . . . . . *passim*

art. III 16

amend. V 2, 46

amend. XIV 13, 18, 44

amend. XIV, § 2 . . . . . 2, 11, 44

STATUTES AND RULES

Census Act, 13 U.S.C. § 141 . . . . . *passim*

13 U.S.C. § 141(a) 13, 19, 20

13 U.S.C. § 141(b) 21

13 U.S.C. § 141(e)(2) 21

13 U.S.C. § 195 . . . . . *passim*

Census Act, 13 U.S.C. § 1, *et seq.*
Pub. L. No. 94-521, 90 Stat. 2459 (1976) 24

Census Act, 13 U.S.C. § 1, *et seq.*
Pub. L. No. 85-207, 71 Stat. 481 (1957) 25

Child Health Services Block Grant,
42 U.S.C. §§ 701 *et seq.* 12

Decennial Census Improvement Act of 1991,
Pub. L. No. 102-135, 105 Stat. 635
(13 U.S.C. § 141 note) 14, 26, 27

Departments of Commerce, Justice, and State,
the Judiciary, and Related Agencies
Appropriations Act, 1998,
Pub. L. No. 105-119, 111 Stat. 2440 16

§ 209(b), 111 Stat. 2481 16

§ 209(e)(1), 111 Stat. 2482 2

Fed. R. Civ. P. 24(b) 16

Headstart Act,
42 U.S.C. §§ 9831 *et seq.* 12

Housing and Community Development Act of 1974,
42 U.S.C. §§ 5301 *et seq.* 12

Social Security Act,
42 U.S.C. § 1397(a), (b) 12

1997 Emergency Supplemental Appropriations Act For Recovery From Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those In Bosnia, Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217 14

23 U.S.C. § 104(b)(6) 12

29 U.S.C. § 707 12

42 U.S.C. §§ 1896 *et seq.* 12

LEGISLATIVE MATERIALS

45 Fed. Reg. 69372 (1980) 32

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137 Cong. Rec. S14327 (daily ed. Oct. 3, 1991) . . . 28

H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1) (1997) 14, 28

H.R. Rep. No. 94-1719 (1976) 25

H.R. Rep. No. 102-227 (1991) 28

S. Rep. No. 94-1256 (1976) 20, 24, 25

MISCELLANEOUS

33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) 14, 29

THE FEDERALIST Nos. 54, 55 (James Madison) (Isaac Kramnick ed., 1987) 42

James J. Harnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VII To Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89 (1993) 8

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BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

OPINION BELOW

The opinion of the district court, *J.S.* 1a, is not yet reported.[1]

JURISDICTION

The judgment of the district court, *J.S.* 66a, was entered on August 24, 1998. Appellants filed their notice of appeal, *J.S.* 68a, on August 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and

[1] References to the jurisdictional statement are cited as "*J.S.*"; references to the joint appendix are cited as "*App.*"; references to the lower court's opinion are cited as "*Op.*"; references to the affidavit of Leobardo F. Estrada in the joint appendix are cited as "*Estrada Aff.*"

State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This Court noted probable jurisdiction on September 10, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at *J.S.*70a.

2. Amendment V of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV, Section 2 of the United States Constitution is reproduced in relevant part at *J.S.*3.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at *J.S.*70a-74a.

STATEMENT OF THE CASE

Equal participation in the American political process depends upon an accurate and equal census count. Yet in the last census, the Census Bureau missed more than four million people, a disproportionate majority of whom were racial and ethnic minorities.[2] Sixty-nine percent of the people the Census Bureau failed to count were members of racial and ethnic minorities, even though members of those groups represent only about 25 percent of the total population.[3] Notwithstanding the fact that the 1990 census was the most expensive and most exhaustive effort in history to employ traditional census methods, it was the first census known to be less accurate overall than its predecessor.[4]

Recognizing that the next census would fall five million short of an accurate count if traditional methods were used exclusively, and that racial and ethnic minorities would again be omitted disproportionately from the census count, the Secretary of Commerce decided to use statistical sampling in conjunction with more traditional census techniques in 2000.[5] An expert panel of the National Academy of Sciences endorsing this approach called it "not just *a* solution to the cost and accuracy problems" of the decennial census, but

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[2] U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age By Race and Hispanic Origin* (visited Oct. 1, 1998) <http://tier2.census.gov/ pl94171/PL94data.htm>.

[3] *Id.*

[4] *Census 2000 Report, App.*48.

[5] *Id.* at *App.*99.

"the *only* solution."[6] Plaintiff House of Representatives, however, seeks in this suit to prevent the implementation of this solution, which is the only practicable solution that addresses the disproportionate undercounting of minorities. National Korean American Service & Education Consortium, Inc. and the other Asian American and Latino organizations and individuals submitting this brief seek to protect their interests in ensuring that the nation's racial and ethnic minorities are counted equally with non-minority whites in the 2000 census.[7]

Because racial and ethnic minorities are likely to be missed in traditional census "head counts," areas in which many minorities live will be disproportionately undercounted as compared to the rest of the nation. It follows that those areas will disproportionately suffer the adverse effects of the undercount. More specifically, it is the people who live in those areas -- many or most of whom are the minorities who are likely to be uncounted -- who will disproportionately bear the brunt of those effects, including the dilution of their votes due to malapportioned political districts, the misallocation of

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[6] *Id.* at *App.*54.

[7] These Asian American and Latino organizations and individuals are National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California.

congressional representation, and a diminished access to federal funding.

Statistical methodology has reached a level of sophistication that will enable the Census Bureau to alleviate the differential undercount in the 2000 census as well as to improve the overall numerical accuracy of census data without compromising the distributive accuracy of the data. At the same time, societal conditions make it increasingly difficult to conduct a reasonably accurate census using traditional survey techniques alone.[8] Although the Census Bureau is prepared to employ advanced scientific methodology to address the realities of modern society and improve the efficiency and accuracy of the 2000 census, the court below has interrupted this progress by prohibiting the use of sampling for purposes of apportionment. The injunction entered below will preserve the advantages of those communities that have been actually or relatively overcounted in the past at the expense of communities with substantial minority populations. As there are neither statutory nor constitutional impediments to the use of statistical sampling in enumerating the population for purposes of apportionment, the injunction should be vacated.

The Essential Failure of Traditional Enumeration Methods To Count Minorities Equally

Every decennial census to date has failed to count a significant portion of the population. *See Wisconsin* v. *City of New York*, 517 U.S. 1, 6 (1996); *Karcher* v. *Daggett*, 462 U.S. 725, 732 (1983). This undercounting might be inconsequential if the undercount were spread evenly across the country. The severity of the undercount, however, varies

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[8] *See Census 2000 Report, App.*83 (stating that "the old [census] system is no longer adequate in light of societal changes").

from place to place and affects certain segments of the population more than others. *Op., J.S.*30 n.2. For almost sixty years, the Census Bureau has acknowledged that the burden of this systemic undercounting falls disproportionately on racial and ethnic minority groups. *Wisconsin*, 517 U.S. at 7. This Court has also recognized this phenomenon, noting in *Karcher*, for example, that "it is accepted that the rate of undercount in the census for black population on a nationwide basis is significantly higher than the rate of undercount for white population." *Karcher*, 462 U.S. at 738 n.9; *accord*, *Wisconsin*, 517 U.S. at 7. The court below described the disproportionate undercounting of minorities as one of "the most troubling aspects of the census in the late 20th century." *J.S.*30 n.2.

The post-enumeration study of the 1990 census revealed an undercount rate that was dramatically higher for members of minority groups than for others. The undercount rate of the entire population was 1.8 percent, though the undercount rate for non-Hispanic whites was only 0.7 percent. In stark contrast, the undercount rate for minority groups was much greater: 5 percent for Hispanics, 4.4 percent for African Americans, and 2.3 percent for Asian/Pacific Islanders.[9] *App.*44, 48-49; *App.*437-38. Of the 4 million people missed overall in the 1990 census, 2.8 million were racial and ethnic minorities. *See* U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1, 1998) <http://tier2.census.gov/pl94171/PL94data.htm>.

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[9] Thus, Hispanics were seven times more likely to be missed than non-Hispanic whites, African Americans were six times more likely to be missed, and Asian/Pacific Islanders three times more likely to be missed. *See Census 2000 Report, App.*49; *C.A.P.E. Report, App.*437.

Incremental improvements in traditional census methodologies made by the Census Bureau simply have not been able to counteract the complex social, economic, and cultural characteristics that tend to be associated with racial and ethnic minorities, and which make these groups more difficult to count than most of the population. These characteristics include "poverty, poor education and language abilities, irregular living arrangements, residence in high crime areas and fear or distrust of government."[10] *See Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1095 (S.D.N.Y. 1987); *see also Census 2000 Report, App.*50-52 (reporting that high population mobility and high concentrations of unmarried individuals are also barriers to accurate census counts in minority communities). For example, even though the national undercount rate has consistently declined over the last six censuses (except in 1990, when it increased), the net undercount of African Americans has hovered around three to four percentage points above that of the population as a whole. *C.A.P.E. Report* at 4; MODERNIZING THE U.S.

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[10] An ethnographic evaluation of the 1990 census closely examined the reasons for the net differential undercount in 29 sample areas. Manuel de la Puente, BUREAU OF THE CENSUS, *Why are People Missed or Erroneously Included by the Census: A Summary of Findings From Ethnographic Coverage Reports, in* 1993 RESEARCH CONFERENCE ON UNDERCOUNTED ETHNIC POPULATIONS, at 29 (May 5-7, 1993). The evaluation concluded that irregular and complex household arrangements, irregular housing, little or no knowledge of English (and in some cases, illiteracy in any language) and fear of government on the part of residents in sample areas contributed to the net undercount in those areas. *Id.* For example, ethnographers who conducted field research identified many instances in which a leaseholder of an apartment who could not afford the entire rent would rent out rooms, or parts of rooms, to unrelated individuals, resulting in an unstable and impersonal "household" structure. In one such arrangement, the leaseholder, his wife and two children lived in one of the three bedrooms in their apartment, while nine other Salvadoran immigrants, some related to each other and some not, shared the remaining two bedrooms. *Id.* at 32.

CENSUS 32-34 (Barry Edmonston & Charles Schultze eds., 1995).

If the members of society most likely to be missed in the census were evenly distributed throughout the country — complete integration — no single area would be undercounted more than another. But since hard-to-enumerate groups like minorities are concentrated in particular geographic areas, those areas are disproportionately undercounted as compared both to areas without such concentrations and to the nation as a whole. *See Karcher*, 462 U.S. at 738 n.9.

The majority of African Americans and Hispanics, for example, live in urban areas. James J. Harnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VII To Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 103 & n.90 (1993). Within those areas, residential patterns tend to be segregated along racial lines. *See* U.S. Census Bureau, *Residential Segregation Summary Tables* (visited Oct. 3, 1998) <http://www.census.gov/pub/hhes/www/housing/resseg/sumtabs.html>.

This concentration of minorities within certain cities correlates with higher-than-average undercount rates in those cities. For example, Inglewood, California, with a minority population of 93 percent, had an undercount rate of 10.9 percent, a rate more than six times higher than the national rate. *Estrada Aff., App.*413-14, ¶ 28. In El Paso, Texas, the minority population makes up 73.6 percent of the total population, and the entire city is undercounted at a rate of 4.45 percent. Yet in West Seneca, New York, where the population is 1.6 percent minority, the population was actually *overcounted* by 1.51 percent. U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1,

1998) <http:// tier2.census.gov/pl94171/PL94data.htm>. One study of the undercount in Los Angeles County identified eight demographic and housing factors thought to affect the accuracy of census enumeration: per capita income, the existence of crowding, poverty, minority households, households containing sub-families, linguistic isolation, foreign born individuals and citizens hip. The study concluded that of all those factors, the percentage of minority households most closely correlated with the undercount percentage in the studied areas. S. Gregory Lipton & Leo F. Estrada, BUREAU OF THE CENSUS, *Factors Associated with Undercount Rates in Los Angeles County*, *in* 1993 RESEARCH CONFERENCE ON UNDERCOUNTED ETHNIC POPULATIONS, at 91-93 (May 5-7, 1993).

The Differential Undercount Results in the Dilution of Minority Votes

The right to vote is fundamental, "because preservative of all other rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It can be abridged by dilution of the weight of a citizen's vote just as effectively as an outright denial of the right. *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). In *Reynolds* this Court declared: "[T]he basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives." 377 U.S. at 567. Yet until the problem of differential undercounting of minorities is corrected, those living in political districts with large minority populations most likely will have their votes diluted as a result of living in districts drawn based on faulty census data

Systemic census inaccuracy and the differential undercounting of minorities effectively precludes states from accurately drawing district lines around equal populations in

areas where minority concentrations are high, which in turn results in unequal voting power for the minorities (and non-minorities) residing therein. Census accuracy, after all, is effectively a prerequisite to equal representation. To protect the constitutional guarantees of equal protection and a representative form of government, this Court has decreed that the states must strive to achieve population equality among congressional districts "as nearly as is practicable." *Karcher*, 462 U.S. at 730 (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964)), and "substantial equality of population" among state and local legislative districts, *Avery* v. *Midland County*, 390 U.S. 474, 484-85 (1968); *Reynolds*, 377 U.S. at 579. In their attempts to achieve population equality, at least with respect to congressional districts, states are required to use the "best population data available." *Karcher*, 462 U.S. at 738; *see also Kirkpatrick* v. *Preisler*, 394 U.S. 526, 535 (1968) (state must use census data unless more accurate data is available). It is indisputable, moreover, that states rely on census figures to draw both federal and state intrastate voting districts in attempting to fulfill their constitutional duties. *See*, *e.g.*, *Wisconsin*, 517 U.S. at 6 ("States use the [census] results in drawing intrastate political districts"); *Young* v. *Klutznick*, 652 F.2d 617, 631 (CA6 1981) (Keith, J., dissenting) ("in recent American history the states have almost invariably used federally-supplied figures for reapportionment"); *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1093 (S.D.N.Y. 1987) ("New York State uses census figures for congressional and state legislative reapportionment.").

The immense disparities among census undercounts (and, in some cases, overcounts) from area to area result in voting districts which are of equal population in theory, but not in fact. Because districts with high minority populations are especially likely to suffer a disproportionate undercount, those districts are more likely to be overpopulated as

compared to their less-diverse counterparts, and the votes of their residents — many of whom, by definition, are minority group members — are more likely to be diluted.[11]

The Differential Undercount of Minorities May Distort the Apportionment of Representatives Among the States

The effects of the differential undercount also may disadvantage an entire state with many minority residents. The Constitution mandates the use of census figures to apportion the Members of the House of Representatives among the states. U.S. CONST. art. I, § 2, cl. 3 & amend. XIV, § 2. As a result of the differential undercount, states with a high concentration of minorities are likely not to receive "credit" for all persons living within their borders, and residents of those states may not receive the number of congressional seats to which they would otherwise be entitled, depending on how the variances from actual population affect each state's share of the overall population of the United States. *See Wisconsin*, 517 U.S. 14. California and Texas, for example, have among the top five population percentages of minorities, at roughly 40 percent, and are among the five states with the greatest undercount. U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1, 1998) <http://tier2.census.gov/ pl94171/PL94data.htm>.

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[11] In *Reynolds*, 377 U.S. at 563, the Court explained that where there is vote dilution, caused by allocating the same number of representatives to unequal numbers of constituents, "[t]wo, five, or 10 of [the voters living in a disfavored area] must vote before the effect of their voting is equivalent to that of their favored neighbor."

The Differential Undercount Results in Diminished Federal Funds for Minorities

In addition to its direct effects on political power, the differential undercount of racial and ethnic minorities influences the allocation of federal funding for education, health, transportation, housing community services and job training.[12] *See*, *e.g.*, *Wisconsin*, 517 U.S. at 1; *Baldrige* v. *Shapiro*, 455 U.S. 345, 353 n.9 (1982). Indeed, section 141(e) of the Census Act contemplates that federal benefits may be dispersed by "taking into account data obtained in the most recent decennial census." 13 U.S.C. § 141(e)(1). In 1990 alone, the federal government distributed about $125 billion to state and local governments, half of which was based at least partially on census population totals. Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 319 (1992). A study of the effects of the 1990 undercount on the distribution of federal funds found that the miscounted jurisdictions that would have benefited from corrected census data would have received an average of $56 more per each miscounted person. *Id.* at 321. To the extent that these monies enable

[12] For example, federal programs that allocate money according to formulas that incorporate total population data include certain subprograms under the Highway Planning and Construction Grant, 23 U.S.C. § 104(b)(6), Rehabilitation Services, 29 U.S.C. § 707, Medicaid, 42 U.S.C. §§ 1896 *et seq.*, Community Development Block Grants authorized by Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.*, Headstart, 42 U.S.C. §§ 9831 *et seq.*, and Child Health Services Block Grant, 42 U.S.C. §§ 701 *et seq.* *See* Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 322-28 (1992); *State* v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992). Notably, the Social Services Block Grant program authorized by Subchapter XX of the Social Security Act, 42 U.S.C. § 1397(a), (b), allocates funding to states in direct proportion to the total population of each state. *Id.* at 321-22.

local and state governments to improve the quality of life of their residents and are based in part on census data, undercounted minority areas, and the individual minorities and non-minorities living therein, suffer by receiving less than their fair share of federal funding.

The Legal Underpinnings of the Decennial Census

The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. 1, § 2, cl. 3. Originally, these "Numbers" were to be determined not by including all members of society in a numerical assessment, but rather, "by adding to the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons." *Id.* The Census Clause then provides that "[t]he actual Enumeration [of the states' respective Numbers] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [the Congress] shall by Law direct." *Id.* The Fourteenth Amendment recognized the status of former slaves as equal "persons" under the Constitution, and requires that the "respective Numbers" of the states for the purpose of apportionment include "the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV.

Congress has delegated to the Secretary of Commerce the responsibility for taking each decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress has also provided that sampling must be used whenever feasible, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195.

The statute does not say that sampling cannot be used for purposes of apportionment.

The Census 2000 Plan

Soon after the inaccuracies of the 1990 census were brought to light, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. § 141 note). That Act directed the Secretary of Commerce to contract with the National Academy of Sciences to study the "means by which the Government could achieve the most accurate population count possible." *Id.* § 2(a)(1), 105 Stat. 635. The three panels established by the Academy "concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost." *Op., J.S.*4a.

In 1997, Congress passed a bill to amend 13 U.S.C. § 141(a) to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1), at 65. That bill was vetoed by the President. *See* 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997). Congress then enacted legislation directing the Department of Commerce to provide to Congress a "comprehensive and detailed plan" outlining its proposed methodologies for conducting the 2000 census. Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217 (1997).

The details of the proposed methodology were presented to Congress in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Report to Congress—The Plan for Census 2000* (Aug. 1997). *App.*34-147. The *Report to Congress* set forth the failings of past decennial censuses and the circumstances the Bureau predicted would exacerbate those failings in the future, and also detailed the statistical sampling and other methodologies the Census Bureau plans to use in the 2000 census.[13] The *Report to Congress* stated that "[a]ll significant departures from the methodologies used in previous censuses have been endorsed by the [National Academy of Sciences], the Bureau's advisory committees, and the scientific community," and noted that the resulting census would be both more accurate and less costly than one using only traditional methodologies. *App.*42.

[13] Experts at the Census Bureau and the three National Academy of Sciences panels concluded that the lower accuracy and increased cost of the 1990 census were the product of several societal trends. First, Americans were less often at home when enumerators visited because they were working more, and they were less willing to spend time filling out census forms. Second, more Americans have become mistrustful of government and concerned about their privacy. Third, increased amounts of "junk mail" obscured important documents like census forms. Finally, more Americans lived in remote or inaccessible housing. *Census 2000 Report*, *App.*50-52. The Census Bureau expects the census-taking environment to be even more difficult in 2000. *Id.* at *App.*52.

The plan for the 2000 census contemplates that statistical sampling will be used in conjunction with the more traditional enumeration methodology involving the mail-out/mail-back of census forms and nonresponse follow-up. In addition to the sampling used in the Postal Vacancy Check program, *see id.* at *App.*87, sampling methodology would be used in two new ways: (1) to complete the follow-up enumerations of those households that did not mail back their census forms; and (2) to refine the inherently flawed data obtained from the mail-out of census forms and personal visits to known addresses. *Id.* at *App.*88-98.

The Lawsuit and Proceedings Below

After it was presented with the Census Bureau's plan, Congress enacted the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440. That Act provides in Section 209(b) that any person "aggrieved by the use of any statistical method in violation of the Constitution or any provision of law," other than the Act itself, can seek judicial relief. 111 Stat. 2481. The United States House of Representatives filed suit to enjoin the use of the Census Bureau's plan, asserting that the use of statistical sampling in determining the population for purposes of apportionment violates both the Census Act and Article I, Section 2, Clause 3 of the Constitution. The suit named the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Bureau's Acting Director (collectively the "Commerce Department") as defendants. National Korean American Service & Education Consortium, Inc. and the other individuals and organizations submitting this brief were one of four groups granted intervention under Fed. R. Civ. P. 24(b). *See Docket Entries, J.S.*2a n.1.

The Commerce Department and the four defendant-intervenor groups moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim, and the House of Representatives moved for summary judgment. The district court denied the motions to dismiss, and granted the motion for summary judgment. *J.S.*66a-7a. The district court concluded that the House of Representatives has Article III standing, that the matter is ripe for judicial review, that dismissal on equitable grounds was not appropriate, and that judicial review of the issues before it did not violate the doctrine of separation of powers. *J.S.*11a-41a.

Turning to the substance of the controversy, the district court also held that the use of statistical sampling in determining the population for purposes of apportionment would violate the Census Act. The court determined that the 1957 version of 13 U.S.C. § 195 prohibited the use of sampling to determine the population for purposes of apportionment, and concluded that the Act's 1976 amendments did not eliminate that prohibition. *J.S.*50a-59a. Further, the court found that "common sense and background knowledge" precluded a reading of the amended Section 195 to permit the use of statistical sampling in the apportionment process. *J.S.*52a. In addition, the court eschewed the argument that Section 141(a) of the Act authorized the use of sampling in determining the population for purposes of apportionment, holding that Section 195 dealt more specifically with sampling than does Section 141, and was "therefore controlling to the extent that the two provisions conflict." *J.S.*61a.

Having concluded that the Census Act prohibits the use of statistical sampling to determine the population for purposes of apportionment, the district court found no need to reach the constitutional question presented. *J.S.*64a.

SUMMARY OF THE ARGUMENT

1. The plain text of sections 141(a) and 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In section 141(a), Congress provides that sampling procedures and special surveys are permissible ways in which to undertake a decennial census of population. Section 195 requires the Secretary to use sampling if he deems it feasible. The introductory clause of section 195, however, exempts

sampling specifically for apportionment purposes from the general requirement that sampling be used. Contrary to the holding of the court below, this exception from the mandatory language of the statute does not prohibit the Secretary from using sampling if he believes it appropriate to do so.

The words of the statutory provisions speak for themselves, and the legislative history, both prior and subsequent, confirms that the Census Act allows the use of sampling in the apportionment process. Nonetheless, even if the statute is found to be ambiguous, the interpretation of the statute presently held by the agency should be given considerable weight. The agency endorses the use of sampling in the Census 2000 for a number of purposes, including for congressional apportionment.

2. Nothing in the Constitution prohibits the use of sampling for purposes of apportioning representatives. Neither the language nor the history of the Constitution offers any indication that the Framers intended to mandate or to prohibit any particular procedure for determining the numbers of the entire population. The records of the Federal Convention, moreover, demonstrate that the "actual Enumeration" mandated by the Constitution was the act of calculating a total based on the formula set forth therein that took into account the whole free population and three-fifths of the slave population, rather than the conduct of an "actual head count." With the ratification of the Fourteenth Amendment, the Constitution for the first time required that the former slaves be counted equally in the decennial "enumeration," giving new meaning to the term.

Although various types of household surveys have historically been the mainstay of the decennial census, past history is not determinative of the limits of Congress's

discretion set forth in the Constitution, which directs Congress to take the census "in such Manner as they shall by Law direct." It does not preclude the use of newly developed methodologies that better account for the entire population. Considerations of equal representation and equal protection, moreover, militate for the use of statistical sampling in the 2000 census in light of the differential undercount of racial and ethnic minorities that is certain to result if only traditional methods are used.

ARGUMENT

I. THE CENSUS ACT EXPRESSLY PERMITS THE USE OF STATISTICAL SAMPLING FOR PURPOSES OF APPORTIONMENT

The Text of the Statute, in Plain and Unambiguous Terms, Permits the Use of Sampling for Purposes of Apportionment

The district court erred in holding that the Census Act precludes the use of statistical sampling in determining the population for purposes of apportionment. The plain language of the statute is controlling absent a clear legislative intent to the contrary. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 20 (1983).

The Census Act expressly provides the Secretary with ample discretion to use statistical sampling for apportionment purposes. Section 141(a) of the Census Act states:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in

> such form and content as he may determine, *including the use of sampling procedures and special surveys*.

13 U.S.C. § 141(a) (emphasis added). On its face, this provision clearly authorizes the use of sampling for the "decennial census of population," including for the purpose of apportionment. Furthermore, section 141(a) of the Census Act is the sole provision authorizing the Secretary to conduct the "actual Enumeration" required by Article I, Section 2, Clause 3 for congressional apportionment. *See Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996) ([t]he Text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial "actual Enumeration"). Thus, it is clear that the "decennial census of population" to be conducted pursuant to section 141(a) — which entails the use of sampling — is to be used for apportionment. *Id.* at 19 (citing section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary"); *see also* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467 (stating "[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population"). Indeed, the court below acknowledged that the text of section 141(a) — by its plain terms — permits sampling for the purposes of apportionment. The district court below stated "[S]ection 141(a) . . . standing alone appears to permit statistical sampling in congressional apportionment." *J.S.*61a.

Other provisions of the statute confirm that section 141(a) authorizes the Secretary to use sampling in the decennial census for the purpose of apportionment. Notably, section 141(b) states that "[t]he tabulation of total population by the States *under subsection (a) of this section*" is "required for the apportionment of Representatives in

Congress among the several states." 13 U.S.C. § 141(b) (emphasis added). Furthermore, section 141(e)(2) expressly provides that "[i]nformation obtained in any mid-decade census [as opposed to the decennial census] shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts." 13 U.S.C. § 141(e)(2). No limitation is placed on the information obtained via the decennial census for apportionment purposes. Thus, taken together, the provisions of section 141 manifest a clear congressional intent that the Secretary be permitted to use "sampling procedures and special surveys" in conducting the "decennial census of population," which is the census to be used for congressional apportionment.

Contrary to the district court's holding, Section 195 is not inconsistent. Section 195 states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. Nothing in the language of this provision prohibits sampling for any purpose. The purpose of this provision, rather than to prohibit sampling, is to *mandate* its use, wherever feasible, in every context except apportionment. Only with respect to apportionment does the Secretary retain absolute discretion to use or not to use sampling.

Although section 195 can be read consistently with section 141 to permit the use of sampling for purposes of

apportionment, the district court held that the two provisions are incompatible. The district court acknowledged that in some instances, the "except/shall sentence structure" as used in section 195 can be interpreted to permit discretion, *J.S.*52a, but found that in this case, based on "[c]ommon sense and background knowledge," section 195 should be interpreted as a prohibition on the use of sampling for purposes of apportionment. *J.S.*52a. Starting with that premise that the two sections conflict, the district court went on to apply the rule of statutory construction dictating that when two provisions conflict, "[t]he more specific provision controls the general." *J.S.*61a. The district court then found that section 195 is the more specific provision and thus controlling. *J.S.*61a.[14]

The district court erred, however, by disregarding the cardinal rule of statutory interpretation that a statute must be read consistently in order to construe each part or section in connection with every other part or section so as to produce a harmonious whole. *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) ("Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, __ U.S. __, 118 S. Ct. 956, 962 (1998) (the "central tenet of interpretation" is "that a statute is to be considered in all its

[14] Only where the conflict between sections of a statute is inescapable should a choice be made between the specific and the general. *Aeron Marine Shipping Co.* v. *United States*, 695 F.2d 567, 576 (D.C. Cir. 1982); SUTHERLAND STATUTORY CONSTRUCTION, Vol. 2A § 46.05 (Norman Singer ed., 5th ed. 1992 & 1998 Supp.). Here, as discussed below, the "conflict" is not inescapable, but entirely avoidable. The two provisions — sections 141 and 195 — can be read consistently.

parts when construing any one of them" and "[i]f we do our job of reading the statute whole, we have to give effect to this plain command, even if doing that will reverse the longstanding practice under the statute and the rule") (citations omitted).

In its opinion below, the district court acknowledged that this cardinal rule of statutory interpretation should be followed, noting that "[w]hatever strength there is to the claim that using statistical sampling in the apportionment enumeration does not violate the Census Act comes from the fact that section 195 must be read together with the other provision addressing sampling methodologies: section 141(a)." *J.S.*59a. Significantly, the district court did not agree with the House's argument that section 141(a) and 195 were harmonious because section 141(a)'s references to sampling applied only to demographic data. Instead, the lower court held that the two provisions conflict because section 195 prohibits sampling for apportionment purposes while section 141(a) "appears to permit statistical sampling in congressional apportionment." *J.S.*61a.

Given the district court's own reading of section 141(a) to grant the Secretary discretion to use sampling, *J.S.*61a, and its view that the sentence structure of section 195 could be read "in some instances" to permit discretion, *J.S.*52a, the court should have read section 195 in the manner consistent with section 141(a) so that the two provisions do not conflict. Indeed, to interpret section 195 otherwise would render section 141(a) superfluous. *See Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'") (citations omitted).

Therefore, based on the plain language and the rules of statutory interpretation, the two provisions should be read together to permit the use of statistical sampling for a variety of purposes, including the purpose of congressional apportionment. As set forth above, the plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures and special surveys" in conducting the "decennial census of population," the census to be used for congressional apportionment. The analysis of the Act need go no further.

Consistent with the Text, the Legislative History of the Statute Demonstrates Congress's Intent to Permit the Use of Sampling for Congressional Apportionment

Further analysis of the statute, although unnecessary, supports the interpretation that permits the use of statistical sampling for purposes of apportionment. It is clear from the legislative history of both sections 141 and 195 that Congress's intent was to strengthen the use of sampling for a number of purposes, including the purpose of congressional apportionment.

Both sections were amended in 1976. The policy shift in these amendments to favor the use of sampling in the decennial census is evidenced in the legislative history of the Act. Significantly, Congress added the provision in section 141(a) to allow sampling without any limitations as to purpose, where previously, that provision had made no mention of sampling or special surveys at all. *See* Pub. L. No. 94-521, 90 Stat. 2459 (1976). Congress declared that the new language in section 141(a) was intended to "encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466 (1976).

Congress's intent was the same regarding the amendment to section 195. In contrast to the current version of section 195 which provides that sampling "shall" be used where "feasible," the 1957 predecessor stated only that "the Secretary *may*, where he deems it *appropriate*, authorize the use of the statistical method known as 'sampling.'" Pub. L. No. 85-207, 71 Stat. 481, 484 (1957) (emphasis added). With these changes, section 195 reads consistently with section 141. As with section 141, legislative history indicates that the intent of the 1976 amendment to section 195 was "to direct the Secretary of Commerce to use sampling and special surveys in lieu of total enumeration . . . whenever feasible," S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5464 (1976), and to "strengthen [ ] the congressional intent that, whenever possible, sampling shall be used." H.R. Rep. No. 94-1719, *reprinted in* 1976 U.S.C.C.A.N. 5476, 5481 (1976). Thus, in its 1976 amendments to the Census Act, Congress clearly reversed its previous failure to endorse sampling, and intended to encourage the use of the method for all purposes.[15]

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[15] Following the 1976 amendments to the Census Act, several courts have held — contrary to the court below — that the statute, with the current version of section 195, permits sampling for purposes of apportionment. For example, one federal district court held that while apportionment is exempted from the statute's mandatory requirement of statistical sampling, it is not prohibited. That court held that "the Census Act permits the Bureau to make statistical adjustments to the headcount in determining the population for apportionment purposes." *City of Philadelphia* v. *Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *see also City of New York* v. *United States Dep't of Commerce*, 34 F.3d 1114, 1125 (CA2 1994) (where the court concluded that "[r]eading §§ 141 and 195 together in light of their legislative history" indicates that "a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged"), *rev'd on other grounds sub nom. Wisconsin* v. *City of New York*, 517 U.S. 1 (1996); *Carey* v. *Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young* v.

(continued...)

Subsequent Legislative Actions Further Confirm Congress's Intent

In addition to the 1976 history, subsequent legislative actions affirm that the 1976 amendments to the Census Act permit sampling for purposes of apportionment. While this Court has made clear that arguments predicated on subsequent legislative actions should be weighed with care, the Court long has recognized that such post-enactment history may be considered in the search for legislative intent. *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (Chief Justice Marshall stated that "[where] the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived"); *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-81 (1969) (stating that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *Andrus, Secretary of the Interior* v. *Shell Oil Co.* 446 U.S. 657, 665-66 (1980) (holding that the intent of Congress can be "confirmed by actions taken in subsequent years by the Interior Department and the Congress").

Since 1976, Congress has taken a number of legislative actions relating to the Census Act and the decennial census that affirm its intent to permit sampling for apportionment purposes. After the results of the 1990 decennial census became known, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. § 141 note) (1991). The Act had two purposes listed under two separate subsections: (a)(1) and (a)(2). Under subsection (a)(1), the Act directed the Secretary to contract with the National Academy of Sciences

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[15] (...continued)
Klutznick, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on jurisdictional grounds*, 652 F.2d 617 (CA6 1981).

to study the "means by which the Government could achieve the most accurate population count possible." *Id.* § 2(a)(1), 105 Stat. 635. Then, with express reference to this subsection (a)(1), the Act further instructed the Academy to consider "the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography (such as States, places, census tracts and census blocks)." *Id.* § 2(b)(1)(C), 105 Stat. 635. Congress obviously believed that the statute allowed the use of sampling since it directed the National Academy to consider the use of such a method. In fact, nowhere on the face of the statute is there any limitation on the purposes for which the sampling method may be used.

The plain text of subsection (a)(2) in comparison to subsection (a)(1) also evidences Congress's intent to permit the use of sampling for the purpose of determining the population (which in turn is used for apportionment), as opposed to using census information for other demographic or housing purposes. Whereas subsection (a)(1) addresses the "most accurate population count possible," subsection (a)(2) addresses the ways to collect "other demographic and housing data." *Id.* § 2(a)(2), 105 Stat. 635. Thus, Congress explicitly directed the National Academy to study the method of sampling "with respect to subsection (a)(1)" — which concerns the population count — in order to achieve the most accurate population count possible.

This distinction between "population" and "other demographic" uses is also important because it clearly discredits the plaintiff's argument below. As the district court noted, the plaintiff argued that both sections 195 and 141(a) could be read together to prohibit sampling because "section 141(a)'s references to sampling and special surveys

applies only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration." *J.S.*60a (emphasis added). However, with this subsequent Act, Congress expressly directed the National Academy to consider sampling for the purpose of achieving "the most accurate population count possible" and not on demographic purposes. Therefore, with section 141(a), Congress clearly intended that sampling methods be used for all purposes as the Secretary deemed feasible.

The legislative history of this subsequent Act further confirms Congress's intent to permit the use of sampling for purposes of apportionment. In discussing the need to study sampling methods in order to "achieve an accurate census," the House Report expressly states that "[i]nformation collected during the decennial census is used for *the allocation of political representation*, as well as federal and state program funds." H.R. Rep. No. 102-227 (1991) (emphasis added). In other words, the House Report discusses the issue of sampling in the context of congressional apportionment, and significantly, makes no reference to any restriction on the use of sampling for apportionment purposes.[16]

Years later in 1997, Congress attempted to amend section 141(a) to prohibit "sampling or any other statistical procedure, including any statistical adjustment" in any determination of population for purposes of the apportionment of Representatives. H.R. 1469, 105th Cong.,

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[16] This House Report accompanies legislation that was passed unanimously by the House. 137 Cong. Rec. S14327 (daily ed. Oct. 3, 1991).

1st Sess., Tit. VIII(b)(1).[17] Strikingly absent from Congress's proposed amendment was any mention that section 195 already prohibited sampling methods for apportionment purposes. Such an amendment obviously would have been unnecessary had section 195 already prohibited the use of sampling.

Therefore, consistent with the text of sections 141(a) and 195, the legislative history to that text, both prior and subsequent, clearly manifests Congress's intent to permit the use of sampling for apportionment purposes.

If the Statute is Deemed Ambiguous, Under *Chevron*, Considerable Deference Should Be Given to the Census Bureau's Current Interpretation of the Statute

Even if the statute is found to be ambiguous, considerable weight should be accorded to the current agency's interpretation of the statutory scheme it is entrusted to administer. *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[18] Although the district court (in a footnote) stated that the court was not required to give deference to the agency's interpretation because the "Secretary of Commerce has reversed his position on this issue," *J.S.*46a-47a, n.11, the

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[17] This bill was vetoed by the President. *See* 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) (veto message).

[18] *See also Regions Hospital* v. *Shalala, Secretary of Health and Human Services*, __ U.S. __, 118 S. Ct. 909, 915 (1998) (stating "[I]f the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight"); *Red Lion*, 395 U.S. at 381 (recognizing the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong").

law is to the contrary. The principles of *Chevron* firmly hold that the agency's interpretation of a statute — even if it varies over the years — is entitled to considerable weight.

In *Chevron*, as here, the agency in charge had to consider competing and often conflicting interests in a technical field. This Court held:

> Our review of the EPA's varying interpretations of the word "source" — both before and after the 1977 Amendments — convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly — not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.
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> * * *
>
> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent

> administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 863-64, 865-866. *See also Rust* v. *Sullivan*, 500 U.S. 173, 186 (1991) ("An agency is not required to 'establish rules of conduct to last forever,' but rather 'must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.'") (citations omitted); *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 742 (1996) (holding that "[o]f course the mere fact that an agency interpretation contradicts a prior agency position is not fatal" and that "change [in agency's position] is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

Here, the agency in charge of administering the decennial census recommends that sampling be used in the 2000 census for a variety of purposes, including congressional apportionment. Under *Chevron* and its progeny, the Census Bureau's position should be respected. Contrary to the district court's characterization of the agency's "reversal" on the issue of sampling, the Census Bureau consistently has interpreted the statute to permit sampling for apportionment purposes for more than a decade in anticipation of the 1990 and 2000 censuses. As for the

1980 census, although the director of the Bureau adopted the view that sampling was not permitted by statute to adjust the 1980 population figures, the Census Bureau at that time was more concerned about whether sampling was operationally feasible as opposed to legally feasible. In 1980, the head of the Census Bureau stated, "[W]hen consulted, the Bureau has steadfastly maintained that, *even if it were legal*, a statistically defensible underenumeration adjustment of the census counts to be used for apportionment was not possible given statutory time constraints and the experimental and developmental character of possible undercount adjustment techniques." 45 Fed. Reg. 69,372 (1980) (emphasis added).

Since the 1980 decennial census was taken, the Census Bureau consistently has supported the use of sampling for all purposes as long as it was operationally feasible. In preparation for the 1990 decennial census, as the district court noted, the head of the Census Bureau actually planned to use the method of sampling to adjust census data obtained from the 1990 decennial census. The Secretary rejected the plan on the ground that the sampling method was not yet sufficiently accurate, *not* on the ground that sampling was prohibited by the Census Act (or the Constitution). In explaining his decision against statistical adjustment of the 1990 census figures, the Secretary explicitly stated that "[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count," 56 Fed. Reg. 33582, at 33,605 (1991); and he observed that "[w]hile judicial opinion is unsettled on the question . . . , the majority of courts considering this issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate," *id.* at 33,606. Thus, the Secretary's determination to use sampling in conducting the decennial census for the year 2000 for whatever purpose he deems

feasible, including for the purpose of apportionment, should be given considerable deference.

The district court also reasoned that the agency's interpretation should not be given deference because "the Secretary has not amply justified his change of interpretation with a 'reasoned analysis.'" *J.S.*46a-47a, n.11 (citations omitted). The Secretary's decision to use sampling has the full support of the top scholars and experts in this field, including, most notably, the National Academy of Sciences, which was hired by Congress to consider whether sampling should be used in the year 2000 census. *See Census 2000 Report, App.*53-55, 83-85. Thus, in accordance with the principles of *Chevron*, the current agency's interpretation of the statute should prevail, and sampling should be allowed to be used in the Year 2000 Census for the purpose of congressional apportionment.

II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING IN ENUMERATING THE POPULATION FOR PURPOSES OF APPORTIONMENT

The district court did not reach the question of whether the use of the phrase "actual Enumeration" in Article I precludes the use of statistical sampling in the 2000 census for purposes of apportionment. If the lower court erred in interpreting the Census Act to prohibit sampling, this issue must be considered.

There is scant basis for plaintiff's argument in the district court below that the words "actual Enumeration" in the context of the Census Clause mandate a "headcount" of the population — a counting of every person one by one. There is, however, considerable reason for rejecting this interpretation. To begin with, plaintiff's restrictive

interpretation of these words is discordant with the conventions of English syntax. It is also contradicted by the context of the sentence and the context of the paragraph in which the words appear. More significantly, the records of the Federal Convention, at which the provisions of the Constitution were drafted, redrafted, and discussed at great length, provide no basis whatsoever on which to imbue these words with such a meaning. To the contrary, the evolution of the drafting and the contemporaneous interpretations of the Census Clause reveal a meaning altogether different from that advanced by the plaintiff. Finally, an interpretation of the Census Clause that precludes the use of the most accurate and evenhanded method of enumeration available to Congress is inconsistent with the constitutional goals of equal representation and equal protection.

The Language of the Census Act Does Not Prescribe a Particular Method of Determining the Total Population Figure

There is no support for the plaintiff's argument that the words "actual Enumeration" suffice to eradicate the discretion the Constitution explicitly gives to Congress, within the *same sentence* of Article I, to conduct the decennial enumeration "in such Manner as they shall by Law direct."

It may be tempting for the ear to consider the words "actual" coupled with the word "enumeration" as an emphatic directive, compelling the listener to use a particular method of enumeration, or as plaintiff argues, to count one by one. But a careful reading of the text of Article I divests

the phrase of this connotation.[19] The first sentence provides that numbers for purposes of apportionment should be determined for each state according to a particular formula that took into account the whole of the free population and three-fifths of the slave population. The second provides for the timing of "*the* actual enumeration," referring to the act of calculating the number previously discussed, rather "*an* actual enumeration," which would signify the introduction of "enumeration" as a new idea without a referent. The same sentence, moreover, expressly provides that the manner of conducting the enumeration is left to the will of Congress. In addition, contrary to the plaintiff's usage, "actual" is not used in the Census Clause to contrast "enumeration" with all other methods, but to contrast the numbers determined by use of the required formula with those underlying the interim

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[19] Article I, § 2, cl. 3 provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. CONST. art. I, § 2, cl.3.

apportionment of Representatives set forth in the Constitution. Thus, the words "actual Enumeration" command that there be an act resulting in a calculation of the states' "respective Numbers" according to a formula; they do not suggest that a particular process must necessarily be used to obtain the base number upon which to apply this formula.

Evidence of the Framers' Intent Shows That a Specific Method Determining the Numbers of the Total Population Was Never Contemplated

Even if the context of "actual Enumeration" did not explain the meaning of the words, the plaintiff's proposed interpretation of "actual Enumeration" is also unsupported by constitutional history evidencing the intent of the Framers. While the word "Enumeration" is susceptible of several meanings, the evolution of the Census Clause demonstrates that in directing Congress to determine the numbers on which representation would be based, the Framers intended to mandate only two things: that the Congress should apply a particular formula to derive a number for apportionment, and that Congress should make this calculation at specified intervals. The federal constitutional convention gives no indication that the Constitution was understood to require or to forbid any particular methodology in conducting the decennial determination of the numbers of the population as a whole.

An examination of the evolution of the clause makes clear that the "Enumeration" with which the Framers were concerned was not a specific method to be used to count the total population. Rather, the "Enumeration" was an act leading to a particular result, or the calculation of the number on which apportionment would be based. In other words, the "actual Enumeration" required by the Census Clause resulted when the constitutional formula that accounted for free

persons and slave persons differently was applied to the numbers of the population as a whole.

The phrase "actual Enumeration" did not become part of the draft Constitution until it was submitted to the Committee of Style late in the Federal Convention. Early discussions about the periodic determination of the basis of apportionment used the word "census," rather than "enumeration." During these proceedings, the word "census" was commonly used to refer not to a headcount of the population, but instead to the final calculation of the numbers on which the apportionment of representatives would be based, counting five slaves as three persons. These numbers, of course, could be derived only by initially determining the true numbers of both slaves and free persons. The "census" number at issue early in the proceedings, however, was not the underlying one to which the formula was to be applied, but rather the end-figure derived by the application of the formula. The method of making the count of the entire population was not at issue, except insofar as it was thought prudent to commit the task to the federal Legislature. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 580 (Max Farrand ed., 1966) (hereinafter "Farrand, Records").

This idea of the census as an act of obtaining an end-figure based on a formula rather than as a process of counting each individual is illustrated in the motion by Hugh Williamson at the Federal Convention on July 11, 1787:

> that in order to ascertain the alterations that may happen in the population & wealth of the several States, a census be taken of the free white inhabitants and 3/5ths of those of other descriptions . . . and that the Representation be regulated accordingly.

1 Farrand, Records at 579.

Edmund Randolph's motion of July 12, 1787 echoes this usage, as he suggests that a periodic "census" be taken according to a stated ratio, proposing

> that in order to ascertain the alterations in Representation that may be required from time to time . . . a census shall be taken within two years from the 1st. meeting of the Genl. Legislature . . . of all the inhabitants in the manner and according to the ratio recommended by Congress in their resolution of the 18th day of Apl. 1783; (rating the blacks at 3/5ths of their number) and that the Legislature of the U.S. shall arrange the Representation accordingly.

1 Farrand, Records at 594.[20] The resolution of the Continental Congress on which Mr. Randolph based his proposal, notably, provides that the number derived from the stated ratio "shall be triennially taken and transmitted to the United States in Congress assembled, *in such mode as they shall direct and appoint.*"[21] 24 JOURNALS OF THE

[20] The resolution ultimately passed by the grand Committee on July 16 read in pertinent part: "Resolved that a Census be taken within six years from the first Meeting of the Legislature of the United States, and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18. 1783 — and that the Legislature of the United States shall proportion the direct Taxation accordingly." 2 Farrand, Records at 14.

[21] The 1783 resolution provided that expenses incurred for the common defense or general welfare

(continued...)

CONTINENTAL CONGRESS 260 (Gaillard Hunt ed., 1922) (emphasis added). Ultimately, the manner of conducting the decennial census required by Article I was likewise left to the discretion of Congress.

The Committee of Detail's report of the draft Constitution presented on August 6, 1787 revealed that the use of the word "census" in the context of apportionment had been abandoned and replaced by language more unambiguously indicating that the Legislature's mandate was to engage in the act of determining the number which would form the basis of apportionment. The provisions that would evolve into Article I, Section 2, clause 3 were set forth in three separate sections of the draft. The first of these sections provided for an initial apportionment of representatives that would stand until the official number of inhabitants was determined:

> The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in

[21] (...continued)
shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint.

24 JOURNALS OF THE CONTINENTAL CONGRESS 260 (Gaillard Hunt ed., 1922).

> the manner herein after described, consist of sixty-five members . . . .

2 Farrand, Records at 178.

The next section of the draft provided that the apportionment of representatives would bear a certain relationship to the official number derived:

> the Legislature shall . . . regulate the number of representatives by the number of inhabitants, according to the provisions herein after made, at the rate of one for every forty thousand.

Id.[22] Finally, the provisions for determining the number of inhabitants for purposes of apportioning representatives were set forth in Article VII, in the section describing the scheme of direct taxation:

> The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants . . . and three fifths of all other persons (except Indians not paying taxes) . . . which number shall, within six years after the first meeting of the Legislature . . . be taken in such manner as the said Legislature shall direct.

[22] The draft was amended on August 8, 1787 to replace the words "according to the provisions hereinafter made" with the words "according to the rule hereafter to be provided for direct taxation." 2 Farrand, Records at 219.

2 Farrand, Records at 182-83. Under the draft report, the Legislature thus was not directed to undertake any particular process for counting the population, but rather merely was given the mandate to determine a number for apportionment resulting from the application of the formula prescribed. Aside from the application of this formula, the particulars of the process were left to the Legislature to decide.

In the later draft of the provisions submitted to the Committee of Style, the nature of the constitutional mandate remained essentially unchanged:

> The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants . . . and three fifths of all other persons . . . (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such a manner as the said Legislature shall direct.

2 Farrand, Records at 571.

On September 12, 1787, the Committee of Style presented another, tidier version of the document. Article I now contained in one section the provision for apportionment of representatives and direct taxes. It also separated the constitutional formula for this apportionment and the instructions for its periodic calculation into two sentences:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the

> whole number of free persons . . ., and excluding Indians not taxed, three fifths of all other persons. *The actual enumeration* shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

2 Farrand, Records at 590-91 (emphasis added). "The actual enumeration" that was mandated, rather than being a particular process of counting heads, was merely the act of calculating a final number pursuant to a formula. There is no indication in the records of the Federal Convention that any of the Framers perceived a substantive change had been made by the Committee of Style in inserting the words "actual enumeration."

That the Framers thought of the "enumeration" or "census" in the apportionment context as the calculation of a total using the prescribed constitutional formula, rather than as a head-counting process, is apparent in James Madison's discussion of the constitutional basis of apportionment in Federalist No. 54. Madison there notes that the southern states might argue "that the slaves, as inhabitants, should have been admitted into the census according to their full number, in like manner with other inhabitants . . . ." THE FEDERALIST No. 54 (James Madison) at 333 (Isaac Kramnick ed., 1987). In Federalist No. 55 Madison again uses the word "census" in the apportionment context to mean "determination according to the formula set forth in the Constitution," predicting that "the first census, will, at the rate of one for every thirty thousand raise the number of representatives to at least one hundred." *Id.* No. 55 at 337.

At least one delegate to the Federal Convention, moreover, expressed an understanding that the constitutional mandate of an "enumeration" required no more of Congress than the making of an estimate when determining the entire population. Luther Martin argued that the interim apportionment of Representatives set forth in the Census Clause disguised the inevitable impact of the actual apportionment, which would give larger states undue power:

> I have taken some pains to obtain some information of the number of free men and slaves in the different States, and I have reason to believe, that if the estimate was *now* taken, which is directed, and one delegate to be sent for every thirty thousand inhabitants, that Virginia would have at least *twelve* delegates . . . . If I am right, Mr. Speaker, upon the enumeration being made, and the representation apportioned according to the rule prescribed, the *whole number* of delegates would be *seventy-one* . . . ."

Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings Lately Held at Philadelphia, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 2.4.45 (Herbert J. Storing ed., 1981) (emphasis in original).

After prolonged debate, the Framers agreed upon language in the Census Clause that directed Congress to give a reduced value to the slave population when calculating the numbers on which apportionment would be directly based, and to make the calculation for apportionment at specified intervals. The clause left the method of counting the population as a whole to the complete discretion of Congress.

The Fourteenth Amendment Commands That Congress Count All Persons Equally

Once the Fourteenth Amendment was ratified, the meaning of the word "enumeration" carried the obligation to count all inhabitants equally, with the exception of Indians not taxed.[23] The Fourteenth Amendment's reference to "counting the whole number of persons in each State" no more requires a "head count" of the population than does the text of Article I. *See* U.S. CONST. amend. XIV. Like Article I, this language mandates no particular method for ascertaining the total number of inhabitants. Rather, the phrase "counting the whole number" was meant to "abrogate[] so much of the corresponding clause of the original constitution as counted only three-fifths" of the numbers of slaves. *Elk* v. *Wilkins*, 112 U.S. 94, 102 (1884). The Fourteenth Amendment rejected the formula set forth in Article I, commanding instead that the respective numbers of the states be determined by "counting the whole number of persons," and requiring Congress to take full account of all persons (except Indians not taxed) when determining the population for purposes of apportionment.

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[23] Section 2 of the Fourteenth Amendment provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. CONST. amend. XIV, § 2.

Census Methods of the Past Do Not Constrain the Discretion of Congress

Justice Frankfurter has noted that "[n]ot the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J. concurring). Although household surveys of various forms have been the mainstay of previous decennial censuses, the historical use of those techniques does not militate for a restrictive interpretation of the Constitution:

> In mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times.

National Mut. Ins. Co. of District of Columbia v. *Tidewater Transfer Co., Inc*, 337 U.S. 582, 585-86 (1949). In the context of this case, the societal conditions that increasingly hinder an accurate and equal census necessitate the use of new tools to fulfill the constitutional goal of equal representation. It is of no moment that the statistical tools chosen for the 2000 census were unforeseen by the Framers and unavailable until recent times. Although historical acceptance may support the idea that a particular action is constitutional, the limits of the Constitution are not delineated by historical practice. Chief Justice Marshall observed in *M'Culloch* v. *Maryland*, 17 U.S. 316, 421 (1819), that

> [t]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by

> which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

A Bar to Statistical Sampling is Inconsistent With the Goals of Equal Representation and Equal Protection

A prohibition of the use of statistical sampling for apportionment purposes would prevent the use of the only method practicable for counting minorities equally with the rest of the population, undermining the constitutional goals of both equal protection and equal representation. It cannot be gainsaid that the Framers did not intend for Article I to stand alone in defining Congressional power. This Court has recognized that "[a]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956). Thus, in order for the decennial enumeration tc comport with the Constitution, that enumeration must be consistent with the constitutional rights of due process and equal protection guaranteed by the Fifth Amendment, as well as with the constitutional goal of equal representation. An interpretation of the Census Clause that would unnecessarily perpetuate a differential undercount of minority populations in the decennial census would be inconsistent with these constitutional rights.

This Court has declared that "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996). The Secretary's discretion in choosing a method of enumeration is limited only insofar as it must be exercised consistent with the language of the Constitution and the goal of equal representation. *Wisconsin*, 517 U.S. at 19-20; *Franklin* v. *Massachusetts*, 505 U.S. 788, 804 (1992). The Secretary's decision to adopt a method of enumeration that better accounts for the entire population, including minorities, is wholly consistent with both the text of the Constitution and the constitutional goal of equal representation.

Census data which underestimate the size of the minority population result in unequal voting districts and political representation, and disproportionately affect communities with a high concentration of minorities. The Census Clause clearly does not mandate continued reliance by the Secretary on traditional census methods which demonstrably undercount the population and always disproportionately undercount minorities, especially in the face of an alternative methodology demonstrated on this record to be superior by every measure of accuracy. Thus, not only is the Secretary's decision to use sampling in the decennial census consistent with the ideals of equal representation, but it may well be mandated by considerations of equal protection. Indeed, vote dilution implicates equal protection principles, as the Court in *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964), noted: "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places, as well as of all races."

The plaintiff's contention that sampling is prohibited, on the other hand, is irreconcilable with the constitutional objective of equal representation in the House for equal

numbers of people. The Constitution commands that Representatives be chosen "by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. This means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). Equal representation cannot be achieved if the form of the decennial enumeration is to be given priority over its accuracy, and it is evident that the Framers intended no such result. This Court has long recognized the importance of striving for parity in intrastate voting districts, notwithstanding inherent imperfections of census data, observing that "[a]s between two standards — equality or something-less-than equality — only the former reflects the aspirations of Art. I § 2." *Karcher* v. *Daggett*, 462 U.S. 725, 732 (1983). Because census data are the foundation of state redistricting decisions, the goal of equal voting districts is no less important in the federal government's enumeration of the population than it is in state governments' use of the federal data. Accurately determining the number of a state's inhabitants is crucial in fulfilling the Framers' intent and the constitutional goal of equal representation, and a failure to strive toward accuracy using the best practicable census methods is inconsistent with that goal.

The differential undercount impairs the rights of minorities to equal representation, potentially diminishes congressional representation for states with substantial minority populations, and deprives minority communities of their fair share of federal funding. The Commerce Department's decision to use statistical sampling in the 2000 census would alleviate the problem of the differential undercount and, for the first time, count the minority population equally with non-minority whites. The decision to use sampling is consistent, therefore, with both the letter and the spirit of the Constitution.

CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the states.

Respectfully submitted,

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